

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CHRISTINE BRUDNAK</b>	:	DETERMINATION
	:	DTA NO. 816226
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Year 1993.	:	

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Petitioner, Christine Brudnak, 2606 1<sup>st</sup> Street #1, Indian Rocks Beach, Florida 33785, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1993.

Petitioner, appearing *pro se*, and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted. On October 16, 1998, the Division of Taxation informed petitioner and the Division of Tax Appeals that it would not be filing a brief, thereby obviating the need for a reply brief. The six-month period for the issuance of this determination commenced on that date.

After review of the evidence and arguments presented, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner timely filed her request for a conciliation conference.

### ***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued a Notice of Deficiency (notice number L-013126565) dated April 7, 1997 to Christine Brudnak at 2606 1<sup>st</sup> Street #1, Indian Rocks Beach, Florida 33785. The notice asserted personal income tax due for the year 1993 in the amount of \$331.88 and interest due of \$86.47, for a total amount due of \$418.35.

Under the heading “EXPLANATION AND INSTRUCTIONS” the notice provides:

NOTE: Any disagreement previously submitted for the Statement of Proposed Audit Changes cannot be considered a disagreement with this notice. You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 07/06/97.

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**If we do not receive a response to this notice by 07/06/97:**

This notice will become an assessment subject to collection action.<sup>1</sup>

2. Petitioner’s request for a conciliation conference, dated August 31, 1997, was date stamped September 8, 1997 by the Bureau of Conciliation and Mediation Services of the Division (“BCMS”). The United States Postal Service postmark on the envelope containing the request is illegible.

Attached to petitioner’s request is a document entitled “Response to Taxpayer Inquiry,” dated March 25, 1997. This document was issued by the Audit Division, Central Office, Income Tax, Audit Group 4 of the Division. It lists L-013126565 as the assessment ID and \$417.97 as the amount due. The body of the document begins with “We have received your reply regarding the above assessment(s).” This is followed by an explanation of the basis of the Division’s

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<sup>1</sup>July 6, 1997 is the due date for a request for conciliation conference or petition as listed on the notice of deficiency. However, since July 6, 1997 was a Sunday, the petition or request for a conciliation conference was required to be filed by Monday, July 7, 1997 (*see*, Tax Law § 691[c]; General Construction Law §§ 20, 25-a; *Matter of American Express Co.*, Tax Appeals Tribunal, July 3, 1991).

assessment and then with the conclusion “The above assessment(s) has been sustained.”<sup>2</sup> A second page, referred to in the document was not attached. At the top of the document is the handwritten notation “This is the only one I could find at this time.”

3. A Conciliation Order Dismissing Request dated October 10, 1997 was issued by BCMS. The reason for dismissing petitioner’s request was:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on April 7, 1997, but the request was not received until September 8, 1997, or in excess of 90 days, the request is late filed.

4. A petition protesting the conciliation order was filed by petitioner on December 12, 1997.<sup>3</sup> In addition to the substantive argument presented in the petition, petitioner asserts that she attached the incorrect notice to her request for conciliation conference, and was attaching the correct notice — the notice that would have made her request timely — to the petition. Attached to the petition is a document entitled “Response to Taxpayer Inquiry,” dated June 16, 1997. This document was issued by the Audit Division, Central Office, Income Tax, Audit Group 4 of the Division. It lists L-013126565 as the assessment ID and \$425.66 as the amount due. The body of the document begins with “We have received your correspondence about the above assessment(s).” This is followed by an explanation of the basis of the Division’s assessment that was different from the previous response:

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<sup>2</sup>There is no explanation as to why this document of the Division mentions an assessment when the notice of deficiency in this matter was not issued until April 7, 1997.

<sup>3</sup>The United States Postal Service postmark on the envelope containing the petition is illegible. Therefore, the burden is on petitioner to prove when the postmark was made. Since petitioner submitted no evidence on this point, the date of receipt of the petition by the Division of Tax Appeals, December 12, 1997, is the date of filing (20 NYCRR 3000.22[a]).

THE INFORMATION WE SENT EARLIER REGARDING MARRIED TAXPAYERS FILING A JOINT FEDERAL RETURN WAS INCORRECT IN YOUR CASE. YOUR FILING STATUS IS SINGLE.

WE APOLOGIZE FOR ANY INCONVENIENCE THIS MAY HAVE CAUSED YOU.

A Notice of Deficiency was mailed to you on 04/07/97. If you are not in agreement with the above and you wish to pursue this matter further, you must either file a request for a Conciliation Conference with the Bureau of Conciliation and Mediation Services or a Petition with the Division of Tax Appeals within 90 days of the date of the Notice of Deficiency. A protest filed prior to the issuance of the Notice of Deficiency is not valid as a petition.

While the document notes that it is continued on the reverse, the photocopy attached to the petition is only of the front of the document. At the top of the document is the handwritten notation "This was the notice that should have been sent."

The record does not contain any correspondence from petitioner that would have generated either the March 25, 1997 or the June 16, 1997 responses of the Division. Based upon the above-quoted language it appears this second document was a correction of the first, and was not sent in response to a separate inquiry from petitioner.

5. On July 2, 1998 the Division of Tax Appeals received a consent executed by the parties waiving a hearing and agreeing to have this matter determined on submission. Pursuant to such agreement the Division submitted documents in support of its position but did not file a brief, while petitioner submitted neither.

6. The Division submitted affidavits concerning the issuance of the Notice of Deficiency, with attachments, from the following personnel: Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System ( "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief

Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notices. The affidavits also describe how these procedures were followed in this case.

7. The general process for issuing and mailing notices of deficiency begins with the CARTS Control Unit receiving a computer printout entitled "ASSESSMENTS RECEIVABLE, CERTIFIED RECORD FOR ZIP +4 MINIMUM DISCOUNT MAIL," referred to as a certified mail record ("CMR") and the corresponding notices of deficiency. The CMR is printed approximately ten days prior to mailing to allow time for processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices of deficiency are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

8. The Mail Processing Center receives batches of notices, together with corresponding CMRs, in an area designated for "Outgoing Certified Mail." Then a member of the staff "operates a machine that puts each statutory notice into an envelope, weighs and seals the envelope and places 'postage' and 'fee' amounts on such envelope." (Baisley Affidavit, p. 1.) Then a mail processing clerk compares the information on the envelopes with that on the CMR for the first and last pieces of certified mail listed on the CMR and a random sample of 30 or fewer other pieces. At some point in the process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the branches of the United States Postal Service in the Albany,

New York area. A postal employee signs or affixes a postmark, or both, to the CMR. The employee of the Mail Processing Center also requests that the postal employee either write in the number of pieces received at the post office in the space provided, or circle the number for the pieces listed, to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. The CMR is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the originating unit, in this case the CARTS Control Unit. In cases of multipage CMRs, the pages are connected when delivered to the United State Postal Service and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

9. In support of its position that the procedures outlined in Findings of Fact "7" and "8" were followed in this case, the Division submitted, together with the affidavits, a copy of the CMR listing petitioner's name and a copy of the notice of deficiency at issue in the present matter. The CMR consists of 74 pages with 11 entries on each page, with the exception of page 74 which has 3 entries, for a total of 806 entries. It shows a printed date of "03/27/97" on each of the 74 pages. On page one of the CMR the printed date has a line through it and above it is the handwritten date of "4/7/97". There is a consecutive listing of 806 certified control numbers beginning with P 911 002 002 and ending with P 911 002 807. There is a legible United States Postal Service postmark of April 7, 1997 on the first and last pages of the CMR and on page 70 where petitioner's name appears.<sup>4</sup> Handwritten initials appear to the left of the postmark on the

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<sup>4</sup>The names and addresses of the other taxpayers listed on the CMR have been redacted to protect their confidentiality.

first and last pages. Next to the phrase “TOTAL PIECES AND AMOUNTS LISTED” on the last page appears the typewritten number “806”. The number 806 is circled. Nothing appears on the last page next to the phrase “TOTAL PIECES RECEIVED AT POST OFFICE.”

Notice number L-013126565, as listed on the CMR, matches the assessment ID number listed on the notice itself. The certified number listed on the CMR for the notice sent to petitioner (P 911 002 768) matches the certified number shown at the top of the notice. The name and address of petitioner as listed on the CMR also correspond to the information set forth on petitioner’s notice. The United States Postal Service postmark of April 7, 1997 on the CMR matches the handwritten date on the CMR and the date appearing on the Notice of Deficiency.

### ***CONCLUSIONS OF LAW***

A. Pursuant to Tax Law § 689(b), petitioner had 90 days from the mailing of the Notice of Deficiency to file a petition with the Division of Tax Appeals. Petitioner also had the option, pursuant to Tax Law § 170(3-a), to file a request for a conciliation conference with BCMS. Petitioner in this case chose to file a request for conciliation conference. The time requirement for filing such a request is the same as the time allowed to file a petition with the Division of Tax Appeals, i.e., 90 days from the mailing of a notice of deficiency (Tax Law § 170[3-a]; Tax Law § 689[b]).

Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference with BCMS is at issue, it is incumbent upon the Division to demonstrate that the notice at issue was properly mailed and when it was mailed. (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991.) This requires that the Division submit evidence sufficient to prove that it has established general mailing procedures and that those procedures

were followed in this instance (*Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). If the Division is able to meet its burden to prove that it has general mailing procedures and that the procedures were followed, a presumption of proper mailing arises (*Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). If the Division is unable to meet this burden, the statutory time limit to file a petition or request for a conciliation conference is in effect tolled and the petition or request will be deemed timely filed (*Matter of Brager, supra; Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Katz, supra*).

B. The Mahon and Baisley affidavits establish the general mailing procedures for mailing of notices of deficiency. The process begins in the CARTS Control Unit. Notices are printed with a future anticipated date of mailing to allow time for the processing of the notices. A certified control number is placed on each notice. The CMR lists each notice number, the name and address of the taxpayer and a corresponding certified mail number. In the Mail Processing Center the notices are placed in envelopes and the envelopes containing the notices are weighed and sealed, and postage and fees are affixed to the envelopes. An employee of the Mail Processing Center compares the information on a sample of the envelopes with that on the CMR, and changes the date on page one of the CMR from the date it was printed to the date the CMR and notices are to be delivered to the post office. The CMR and notices are then delivered to the post office. A postal employee signs or affixes a postmark to the CMR, or both. The postal employee is requested to either write in the number of pieces received at the post office in the space provided, or circle the number for the pieces listed, to indicate that was the number received. Usually on the next day an employee of the Mail Processing Center returns to the post



office to pick up the completed CMR. Completed CMRs are then returned to the originating unit.

C. The CMR submitted, together with the Mahon and Baisley affidavits, illustrate that the Division's mailing procedures were followed in this case. The name, address, notice number and certified control number on the notice issued to petitioner correspond with those listed on the CMR for petitioner. The date of the Postal Service postmark on the page of the CMR listing the notice at issue, and the last page where the postal service employee's initials are found, indicates the notices were mailed on April 7, 1997. Mr. Baisley's affidavit indicating that Mail Processing Center staff request that postal employees either write in the number of pieces received at the post office in the space provided, or circle the pieces listed to indicate the number of pieces received at the post office, together with the CMR submitted in this matter which has a circle around the number of pieces listed, is sufficient to prove that all 806 pieces of mail listed were received at the post office (*see, Matter of Eastern Carriers*, Tax Appeals Tribunal, April 2, 1998).

D. The Tax Appeals Tribunal has held that evidence of general mailing procedures together with a properly completed CMR is sufficient to prove mailing (*see, Matter of Katz, supra*). Since there is both with regard to petitioner, the Division is entitled to the presumption of proper mailing in this case. Notice of Deficiency number L-013126565 for personal income tax for the year 1993 was issued and mailed to Christine Brudnak on April 7, 1997.

E. The final question is whether petitioner timely filed her request for a conciliation conference with BCMS. Pursuant to Tax Law § 170(3-a) and Tax Law § 689(b), petitioner had 90 days from the mailing of the notice to file a request for a conciliation conference with BCMS. Counting 90 days from April 7, 1997 results in a July 7, 1997 due date for the request. The

United States Postal Service postmark on the envelope containing the request is illegible.

Therefore, the burden is on petitioner to prove when the postmark was made (20 NYCRR 4000.7[a][2][iii][a]). Since petitioner submitted no evidence on this point, the next question is whether the date of receipt of the request by BCMS, September 8, 1997, was within the time frame that mail would have ordinarily been received by BCMS if it had been postmarked by the July 7, 1997 due date. (20 NYCRR 4000.7[a], [c]). It is not reasonable that mail postmarked on July 7, 1997 would take two months, or until September 8, 1997 to reach BCMS (*cf. Matter of Harron's Electric Serv.*, Tax Appeals Tribunal, February 19, 1988 [five days is reasonable]). Finally, the request could be considered to have been received by BCMS in a reasonable period of time if petitioner can show that it was actually deposited timely with the post office, the delay in receiving the request was due to a delay in the delivery of the mail and what that delay was (20 NYCRR 4000.7[b][2], [c]). Petitioner submitted no evidence on these points. Therefore, since petitioner has not met any of the requirements set forth in the regulations, petitioner's request "will not be considered to be timely served or timely filed" (20 NYCRR 4000.7[a][2]).

F. Petitioner asserts that her request was timely filed because it was within 90 days of the Division's "Response to Taxpayer Inquiry" dated June 16, 1997. While some confusion on petitioner's part is understandable since the first "Response to Taxpayer Inquiry" dated March 25, 1997 refers to an assessment that had not yet been issued, neither of the Division's responses constitutes a statutory notice that begins the 90-day period for filing either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals.

Furthermore, the June response clearly warned petitioner that such request or petition had to be filed within 90 days from April 7, 1997, the date of the notice of deficiency, and that any protests made prior to the issuance of the notice of deficiency were not valid. Even if petitioner had filed

a protest before the issuance of the notice of deficiency,<sup>5</sup> such a protest is not considered a valid protest for purposes of tolling the 90-day requirement (*see, Matter of West Mountain Corp. v. State of NY Dept. of Taxation and Finance*, 105 AD2d 989, 482 NYS2d 140, *affd* 64 NY2d 991, 489 NYS2d 62; *Matter of Best Ray Pizza*, Tax Appeals Tribunal, May 16, 1996).

G. There being no timely request for a conciliation conference, the petition must be dismissed (*see, Matter of 3410 Pons Food*, Tax Appeals Tribunal, September 7, 1995; *Matter of Greene Valley Liquors*, November 25, 1992), and the Division of Tax Appeals is without jurisdiction to review the substantive arguments presented in the petition. (*Matter of Fresina*, Tax Appeals Tribunal, January 30, 1997; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996.)

H. Accordingly, it is ordered that the petition of Christine D. Brudnak is dismissed.

DATED: Troy, New York  
December 17, 1998

/s/ Roberta Moseley Nero  
ADMINISTRATIVE LAW JUDGE

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<sup>5</sup>While the responses of the Division were obviously prompted by some type of communication from petitioner, there is no evidence of such communication in the record.